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In The
Supreme Court of the United States
October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 (the Act) became law on April 24, 1996. The Act amended 28 U.S.C. § 2254(d) to deprive a federal habeas court of authority to grant relief with respect to any claim that was adjudicated on the merits in state proceedings unless the adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The question presented is:

Does this amendment, which precludes granting habeas relief to a person in custody under the judgment and sentence of a state court except under narrowly prescribed circumstances, apply to pending cases?

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The State[1] offers the following information for the purpose of clarification.

Pursuant to Wisconsin law, Lindh had a bifurcated trial. At the guilt phase, the jury found him guilty beyond a reasonable doubt of two counts of first-degree murder and one count of attempted murder. J.A. 88. Lindh raised no issues regarding the guilt phase in his federal habeas petition.

[1]For consistency, we refer to petitioner as "Lindh" and to the respondent as "the State."

At the insanity phase, which is a dispositional phase under Wisconsin law, Lindh had the burden of proving to the jury by the greater weight of the credible evidence that as a result of mental disease he lacked substantial capacity to either appreciate the wrongfulness of his conduct or conform his conduct to the law. J.A. 88-89. He failed to carry his burden of proof. *Id.*

The sole issue on habeas was whether the trial court denied Lindh's confrontation rights when it refused to allow him to question the state's expert at the insanity phase, Dr. Roberts, about allegations that Roberts had engaged in sexual misconduct with female patients. J.A. 10-11. The defense wanted to ensure that the jury would not view Roberts as though he were as "'pure as the driven snow.'" J.A. 12.

At the pretrial hearing on the issue, defense counsel stated that University Hospitals had suspended Roberts' privileges, but offered no proof of that fact. J.A. 11, 96-97.

The Dane County prosecutor's office retained Roberts to examine Lindh on the afternoon of the shootings, January 15, 1988, and Roberts' critical initial interview with Lindh occurred later that same night. J.A. 89-93. Roberts interviewed Lindh again in June and August and submitted his report in August 1988. J.A. 94-95. Roberts testified at the trial in September that Lindh did not suffer from a mental disease at the time of the offense and that Lindh knew his conduct was wrong and could conform his conduct to the law. J.A. 100. Lindh never questioned Roberts about whether his opinion changed at any time between his first contact with Lindh in January 1988, his report in August, and his trial testimony in September.

Lindh did establish, however, that at the time Roberts became involved in the case and interviewed Lindh on January 15, 1988, Roberts had no knowledge of any allegations of misconduct that were going to be lodged

against him. J.A. 39. On March 8, 1988, Roberts first learned from a hospital attorney that the hospital was investigating allegations of sexual misconduct with patients. J.A. 39-41. Prior to that date, Roberts was not aware, even informally or indirectly, that such allegations might be coming down against him. J.A. 41. At that point, Roberts was aware there was a crime against such conduct but did not know the potential penalty. J.A. 40. Although he had not thought about it at the time, Roberts indicated he would presume any prosecution would be in the same county, so it would be in the Dane County District Attorney's Office. J.A. 42, 93.

Roberts learned in May 1988 that the Medical Examining Board was investigating allegations against him of sexual misconduct by three female patients. J.A. 41-42, 94. On July 8, Roberts first learned from his own attorney that the matter had been referred to the Dane County prosecutor's office and at that time he also learned that a special prosecutor was appointed. J.A. 42-44, 95. Roberts did not know until the day of the pretrial hearing that the Dane County prosecutor had even met with hospital officials. J.A. 42.

Neither Roberts nor his attorney was ever contacted by any representative of the Dane County District Attorney's Office or the police regarding the sexual misconduct allegations. J.A. 94-95. The Dane County District Attorney's Office never made any formal or informal decision regarding whether a criminal investigation or charges against Roberts were warranted. No one from the Dane County District Attorney's Office had any contact with the special prosecutor or discussed it with the special prosecutor after the special prosecutor appointment. There was no evidence that as of the time of trial any criminal investigation was conducted at all. J.A. 95.

Roberts testified at the pretrial hearing that the sexual misconduct allegations did not have any effect whatsoever

on his involvement in the Lindh case. J.A. 44. Lindh's counsel conceded that there was no allegation of bad faith or wrongdoing on the part of the prosecution. J.A. 96.

The sexual misconduct allegations involved therapist-patient relationships Roberts had between May 1982 and April 1986 with patient 1; between September 1981 and February 1983 with patient 2; and between June 1983 and February 1988 with patient 3. J.A. 22-29. Wisconsin's crime of sexual exploitation by a therapist, sec. 940.22, Wis. Stats., was enacted in 1984, effective May 18, 1984. It was originally a misdemeanor. It became a five-year felony by a change of statute effective April 30, 1986.

The Wisconsin Supreme Court upheld the trial court's refusal to allow Lindh to question Roberts about the sexual misconduct allegations. The Wisconsin Supreme Court held the circumstances in this case presented no reasonable basis for the jury to believe Roberts had a motive to curry favor or hope for leniency by virtue of his testimony in the Lindh case. J.A. 105-15. Moreover, evidence that Roberts may have engaged in professional misconduct and was subject to discipline did not tend to impeach his truthfulness and ability as an expert witness on insanity. J.A. 114-22.

SUMMARY OF ARGUMENT

This Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), establishes the proper analysis for determining whether a federal statute applies to a case that was pending when the statute became law. The United States Court of Appeals for the Seventh Circuit (Seventh Circuit or court of appeals) correctly applied that analysis in determining that 2254(d) applies to pending cases.

Under *Landgraf*, if Congress has expressly prescribed the statute's temporal reach in the text of the statute, the

courts will honor that express command. *Landgraf*, 511 U.S. at 280.

The Act expressly states that a new habeas chapter, Chapter 154 regarding capital opt-in provisions, shall apply to cases pending on or after the effective date of the Act. The Act also specifically mandates that certain non-habeas provisions are prospective or partially prospective. But it is silent regarding the temporal reach of 2254(d) as it applies to non-capital cases and capital, non-opt-in cases. Because the statute is silent, this Court must apply the principles articulated in *Landgraf* to determine whether 2254(d) applies to pending cases. This Court cannot substitute negative inferences, statutory maxims, and generalized principles of legislative intent for an express command.

Under *Landgraf*, the Court must determine whether application of the statute to pending cases would have a retroactive effect.

A statute has a retroactive effect within the meaning of *Landgraf* only if it attaches new legal consequences to events completed before its enactment. This requires examination of the "nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270. A statute has a retroactive effect if it impairs rights a party possessed when he acted, increases liability for a party's past conduct, or imposes new duties with respect to completed transactions. *Landgraf*, 511 U.S. at 280.

The *Landgraf* rules governing the temporal reach of new statutes protect legitimate interests in settled expectations, finality, and repose. This statute limits the circumstances in which a federal court has authority to grant habeas relief. Habeas is a mechanism for unsettling settled expectations and disrupting finality and repose.

Any limitation on habeas relief, therefore, protects legitimate interests in settled expectations, finality, and repose.

Examination of the nature and extent of the change in the law requires an examination of the function of habeas. It is not the function of habeas to vindicate constitutional rights; the state courts are both capable and willing to do so. Habeas is a safeguard for the rare case where the state court refuses to uphold the Constitution or fails to reasonably apply controlling constitutional principles. The nature and function of the law demonstrate that 2254(d) should apply to pending cases because it governs the authority of the federal court to grant relief.

Section 2254(d) extends, but is not critically different from, the principles developed by this Court in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality), and its progeny.[2] The federal court exercises independent interpretive power to determine whether a state court adjudication of a federal constitutional claim is contrary to controlling precedent. But where the issue is the application of that law to the facts, federal habeas relief may be granted only if the state court decision is unreasonable. Section 2254(d) does not require the federal court to leave undisturbed a reasonable, but "wrong" application of law to facts. It requires the federal court to leave undisturbed a reasonable state court application of law with which the federal court disagrees. The federal court will no longer be allowed to substitute its judgment for that of the state court. Section 2254(d) limits the authority of the federal court to grant habeas relief.

Section 2254(d) does not attach new legal consequences to completed events because it involves prospective relief and a change in procedure.

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[2]Adopted by majority in *Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989).

Landgraf also teaches that jurisdictional statutes do not attach new legal consequences to completed events and therefore do not have a retroactive effect. Section 2254(d) is a jurisdictional statute because it limits the exercise of federal court jurisdiction.

Turning to Lindh's specific arguments, 2254(d) does not divest a habeas petitioner of a vested, mature, or unconditional right or alter the normative scope of a cause of action. Lindh claims the statute deprives him of a right to relief that attached on the date he filed his habeas petition. Lindh's attempt to analogize to contract, property, tort, and discrimination cases fails. Neither the crime, the state court proceedings, nor the filing of the petition constitutes a relevant past event which is substantially connected to the operation of the new law. The "right" Lindh claims is nothing more than an expectation or hope of a particular outcome in his case. Such an expectation or hope is not protected from a change in the law.

The court of appeals did not erroneously substitute an actual reliance test or a wrongful presumption of retroactivity for habeas-curtailing statutes for the principles announced in *Landgraf*. Rather, as *Landgraf* instructs, the court of appeals considered the nature and extent of the change in the law to determine whether the new law attaches new legal consequences to completed events. So viewed, 2254(d) would not have a retroactive effect if applied to pending cases.

Alternatively, we ask, "what is the relevant activity that the rule regulates?" *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 291 (1994) (Scalia, J., concurring; joined by Kennedy, J., and Thomas, J.). Section 2254(d) regulates the federal court activity of granting or denying habeas relief. When a federal court exercises authority to grant or deny relief, it can only exercise the authority it possesses at the time it acts. A federal court exercising such

authority after 2254(d) became law, as the court of appeals did here, is constrained to exert only the limited authority given to it by 2254(d).

ARGUMENT

SECTION 2254(d) APPLIES TO ALL CASES PENDING ON OR AFTER THE DATE OF ITS ENACTMENT.

I. Brief Summary Of The *Landgraf* Framework Used To Determine Whether A New Statute Applies To Pending Cases.

This Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), sets forth the proper analysis for determining whether a federal statute applies to a case that was pending when the statute was enacted. Under *Landgraf*, if Congress has expressly prescribed the statute's proper reach, the court will honor Congress's express command. *Landgraf*, 511 U.S. 264, 280.[3] However, if the statute contains no express command, the court must determine whether application of the new statute would have a retroactive effect. *Id.* at 280. A statute has a retroactive effect only if it attaches new legal consequences to events completed before its enactment. *Id.* at 269-70. If the statute would have a retroactive effect, it will not be applied to a pending case absent clear congressional intent favoring that result. *Id.* But if the statute would not operate retroactively, then the court should apply the statute to a pending case. *Landgraf*, 511 U.S. at 277.

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[3]The court, of course, will not apply a statute to pre-enactment conduct if such application would be unconstitutional. Here, Lindh does not allege, and could not demonstrate, that application of this statute to pending cases would violate any constitutional provision.

Under *Landgraf*, there is no presumption against applying a statute to pending cases or to pre-enactment conduct. There is only a presumption against such application if the statute involved falls within that "class of new statutes that would have genuinely 'retroactive' effect." *Landgraf*, 511 U.S. at 277.

Here, Congress has not expressly prescribed the statute's proper temporal reach. Accordingly, an analysis of whether the statute would have a genuinely retroactive effect is necessary. That analysis demonstrates that application of 2254(d) to pending cases would not have a retroactive effect.

II. The Act Does Not Expressly State Whether 2254(d) Applies to Pending Cases.

When a case involves a federal statute enacted while a suit is pending, "the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. If Congress has provided such an express command, that command will govern. *Id.*

In this case, Congress did not expressly prescribe the proper temporal reach of 2254(d). Congress made no express command that the statute would apply to all cases pending on or after April 24, 1996. It made no express command that the statute would apply only to petitions filed after April 24, 1996. It made no express command that the statute would apply only to cases in which the crime occurred or the state court adjudicated the petitioner's claim after April 24, 1996. Rather, Congress was wholly silent regarding the temporal reach of 2254(d). Since Congress chose not to expressly command the proper temporal reach of a statute, this Court must determine the statute's temporal reach by applying the principles established in *Landgraf*, 511 U.S. at 263, 280.

Although Congress was silent as to the temporal reach of provisions in Chapter 153, including 2254(d), Congress did expressly provide that the new Chapter 154 of Title 28 (special habeas corpus proceedings in capital cases, dubbed the "opt-in provisions") "shall apply to cases pending on or after the date of enactment of this Act." Antiterrorism and Death Penalty Act, sec. 107(c) of Ch. 154. Lindh's classic negative inference argument (because Congress specifically provided that Chapter 154 applies to pending cases, Congress meant that no other habeas provisions of the Act apply to pending cases and thus all provisions except those encompassed in Chapter 154 are prospective only) must be rejected.

Congress directly designated the new Chapter 154 habeas provisions of the Act applicable to pending cases. Congress remained silent regarding the immediate applicability of all the other habeas provisions amended by the Act. The first prong of the *Landgraf* analysis does not look to a broad question of legislative intent; it requires an express command. *See Hunter v. United States*, 101 F.3d 1565, 1569 (CA11 1996). If there is no express command, this Court must apply the principles of *Landgraf*. Lindh deliberately commingles step one of *Landgraf*, which requires an express command, with step three, which considers legislative intent. But under a proper application of *Landgraf*, this Court will reach step three only if Lindh first fails to prove the statute contains an express command (step one) and only if he succeeds in proving that application of the statute to pending cases would have a genuinely retroactive effect (step two).

This Court must reject Lindh's theory because it requires the Court to construe silence as an express command; it requires the Court to find an express command from a negative inference; and it requires the Court to substitute general canons of statutory interpretation for an express command of Congress. *Landgraf* rejected the kind of arguments upon which Lindh

relies. *Landgraf*, 511 U.S. at 257-63; *Lindh v. Murphy*, J.A. 158-60.

Congress's express command that the new habeas opt-in chapter is applicable to pending cases is, quite simply, not an express command that all the other habeas provisions in the entire Act are prospective only.

The court of appeals quite rightly rejected Lindh's convoluted theory that sec. 2264(b) constitutes an express command that 2254(d) and 2254(e) are prospective as to all cases except capital opt-in cases. The court of appeals explained that 2264(b) does not specify the temporal reach of provisions; it specifies which 2254 provisions apply to capital opt-in cases (Chapter 154 cases). For example, the 2254 provisions regarding exhaustion and procedural default are not applicable because Chapter 154 contains its own provisions on those matters. *Lindh v. Murphy*, J.A. 159-61.

Even if this Court could substitute a negative inference for an express command, there is no support for the inference Lindh asks the Court to draw. There is a simple and logical explanation for why Congress specifically provided that the Chapter 154 provisions would apply to pending cases. Unlike the general habeas provisions in the rest of the Act, the death-penalty-related provisions in Chapter 154 are applicable only if a state establishes a mechanism for the appointment of counsel in postconviction cases that meets the strict standards set forth in that chapter. This relationship could suggest that Chapter 154 only applies to future state proceedings:

> Viewed in this light, it is not surprising that Congress expressly declared its intention that chapter 154 *could* apply to a capital habeas case currently pending in federal court where the state already had standards in place that satisfied the chapter's new requirements. The specific language

> stating the scope of the chapter's application was necessary to negate the inference, created by the statutory language, that the new chapter only affected future state cases.

Leavitt v. Arave, 927 F. Supp. 394, 398 (D. Idaho 1996) (emphasis in original).[4]

On the other hand, there is no sensible explanation for why Congress would want 2254(d), which admittedly reduces the likelihood that a habeas petitioner will be granted relief, to apply to some capital cases, but not to all capital cases and not to any non-capital cases.

Congress's silence on the temporal applicability of the habeas provisions outside of Chapter 154 is inherently ambiguous. We don't know why the Act does not contain an express command that 2254(d) applies to all pending cases. Perhaps Congress could not reach agreement, so the matter was left to the courts to determine.[5] Perhaps Congress overlooked this detail. Or perhaps Congress thought it so clear that 2254(d) would be interpreted to apply to all pending cases that express provision was not necessary. But such speculation is neither fruitful, nor necessary. The point is, Congress did not provide an

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[4]Other courts have held that the habeas provisions in Chapter 153 apply to pending cases. For a representative sampling only, *see Hunter v. United States*, 101 F.3d 1565 (CA11 1996); *Drinkard v. Johnson*, 97 F.3d 751 (CA5 1996), *cert. denied*, 65 U.S.L.W. 3598 (U.S. Mar. 3, 1997) (No. 96-7359); *Moore v. Johnson*, 101 F.3d 1069 (CA5 1996); *Williams v. Stegall*, 945 F. Supp. 145 (E.D. Mich. 1996).

[5]Lindh's amicus suggests as much, contending that sec. 2254(d) "represents a compromise between different camps of habeas reformers--a compromise necessary to win passage of a general reform bill in 1996" (brief of amicus, National Association of Criminal Defense Lawyers, at 8).

express command, and thus this Court must apply the principles established in *Landgraf* to determine the proper temporal reach of the statute.

In *Landgraf*, this Court invited Congress to take responsibility for deciding the temporal reach of statutes. After *Landgraf*, Congress was on notice that if it reached agreement about the temporal reach of a statute and if it wanted that agreement to govern, it must include an express command regarding the reach of the statute in the text of the statute. If it failed to do so--inadvertently, deliberately, due to lack of agreement, or for any other reason--the courts would apply the *Landgraf* analysis to determine the statute's reach.

Landgraf did not instruct Congress that if Congress failed to enact an express command regarding the temporal reach of the statute, a presumption of prospective application would be triggered. Under *Landgraf*, absence of an express command does not trigger a "presumption of prospective application." Absence of an express command simply triggers the *Landgraf* analysis. *Landgraf*, 511 U.S. at 263.

It is significant that a number of provisions in the Act specify the exact temporal reach of other changes in the Act. Some are fully prospective; some are partially prospective. The important point is that they are express commands. They prove that Congress "was quite capable of and willing to express its intent about" the temporal reach of provisions in the Act when it wished to do so. *Hunter*, 101 F.3d at 1570. Its failure to do so regarding any particular provision requires the court to apply the *Landgraf* analysis. *Id.* at 1569-70. Lindh's argument that the Court must ignore this reality because the Act does not represent a "single author's crafting of a cohesive monograph in nine chapters" (brief of Lindh at 28) is wrong. This Court sits to review the law which appears on

the printed page, not the process by which it was enacted and not its literary quality. *See Landgraf*, 511 U.S. at 263.

Interpreting the law which was enacted, Lindh has utterly failed to show that it contains an express command that 2254(d) is prospective as applied to non-capital or capital, non-opt-in cases. Rather, the Act is silent. Because the statute is silent, the Court must apply the principles articulated in *Landgraf*. Under those principles, 2254(d) applies to pending cases because it does not have a retroactive effect.

III. Section 2254(d) Applies To Pending Cases Because It Does Not Have A Retroactive Effect. It Regulates The Jurisdiction Of The Federal Court To Grant Relief; It Does Not Impair Rights A Party Possessed When He Acted, Increase A Party's Liability For Past Conduct, Or Impose New Duties With Respect To Completed Transactions.

A. A new statute applies to pending cases unless it has a retroactive effect because it attaches new legal consequences to events completed before its enactment.

Because the Act does not contain an express command prescribing the temporal reach of 2254(d), this Court must determine whether Congress intended the provision to apply to pending cases or pre-enactment conduct by determining whether such application would have a retroactive effect or operation. *Landgraf*, 511 U.S. at 277, 280. A new statute applies to pending cases unless it falls within "the class of new statutes that would have genuinely 'retroactive' effect." *Landgraf*, 511 U.S. at 277.

A statute does not have a retroactive effect merely because it is applied in a case arising from conduct that

occurred before the statute's enactment. A statute does not have a retroactive effect merely because it upsets expectations based on prior law. Even unquestionably prospective statutes can unsettle expectations and impose burdens on past conduct. Not every expectation, hope, or dream is protected from changes in the law. *See Landgraf*, 511 U.S. at 269-70.

A statute has a retroactive effect if it "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. "New legal consequences" is a term of art: it does not include any and all perceived negative consequences that would result from application of a new law. New legal consequences are only those which have a particular effect--those that would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. *Landgraf*, 511 U.S. at 268-69, 280.

Thus, it is not enough to say that the law was different when the party engaged in certain conduct and that he expected and hoped for the benefits of the law that existed at that time:

> Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Landgraf, 511 U.S. at 269-70. This judgment is informed by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270.

B. Consideration of the nature and extent of the change in the law leads to the conclusion that 2254(d) does not have a retroactive effect.

1. Examination of the nature of the change in the law focuses first on the function and purpose of habeas.

The judgment that 2254(d) does not have a retroactive effect begins with an examination of the nature of the change in the law. *See Landgraf*, 511 U.S. at 270. That judgment begins with recognition of the reasons the law disfavors statutes that have a retroactive effect. A new statute attaches new legal consequences only if the interest harmed by the new law is an interest that is deserving of protection against a change in the law. *See State ex rel. Briggs & Stratton Corp. v. Noll*, 100 Wis. 2d 650, 663, 302 N.W.2d 487, 494 (1981) (Abrahamson, J., dissenting). Elementary notions of fairness protect legitimate expectations about the legal consequences of conduct. "[I]ndividuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . ." *Landgraf*, 511 U.S. at 265. Individuals should be able to conduct their lives, engage in business, and interact with their fellows and governmental entities, "confiden[t] about the legal consequences of their actions." *Landgraf*, 511 U.S. at 266.

Concerns about retroactivity are essentially concerns about repose and finality. The legal consequences of action once taken should not lightly be undone. *Landgraf*, 511 U.S. at 265. Even if the law under which actions were taken is ultimately invalidated, rights which had become vested under that law and prior determinations under that law which had become final will not be undone. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374-75 (1940). Both individuals and governmental entities are generally entitled to rely upon final judgments which

impose legal consequences for past conduct. New legal consequences which give a new statute retroactive effect are only those consequences which destroy legitimate interests in settled expectations, finality, and repose.

Under *Landgraf*, to determine whether a new statute attaches new legal consequences to events completed before its enactment, we first examine the nature of the statute involved. Section 2254(d) defines the authority of federal courts to grant relief from final judgments to state prisoners. Here, the nature of the statute is critical because habeas itself is a vehicle for destroying the repose of a final judgment. Any limitation on habeas in turn serves to protect legitimate settled expectations, finality, and repose--the very interests protected by the rules governing the applicability of new statutes to pending cases.

The writ strikes at finality of judgments, which is one of the law's very objects. *McCleskey v. Zant*, 499 U.S. 467, 491 (1991); *see also Williams v. United States*, 401 U.S. 646, 682-83 (1971) (Harlan, J., concurring in part and dissenting in part). Consideration of the nature of the change in the law involved here requires consideration of the function of habeas corpus.

It is not the purpose of habeas corpus to "assure that an individual accused of crime is afforded a trial free of constitutional error." *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion). Federal review of state court criminal judgments does not exist to vindicate constitutional rights of the defendant. Vindication of constitutional rights occurs in the state trial and appellate courts, for those courts have primary responsibility for enforcing constitutional rights. *Withrow v. Williams*, 507 U.S. 680, 698-99 (1993) (O'Connor, J., concurring in part and dissenting in part; joined by Rehnquist, C.J.).

All state courts, and state judges, are bound by the Constitution itself to uphold the Constitution and to obey the dictates of the United States Supreme Court which is the "supreme judicial interpreter of the Federal Constitution." *Withrow v. Williams*, 507 U.S. at 723 (Scalia, J., concurring in part and dissenting in part; joined by Thomas, J.). "Absent indication to the contrary, state courts should be presumed to have applied federal law as faithfully as federal courts." *Id.*

"State courts are coequal parts of our national judicial system and give serious attention to their responsibilities . . . ." *Sawyer v. Smith*, 497 U.S. 227, 241 (1990).

> State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted, all are not doing their mortal best to discharge their oath of office.

Sumner v. Mata, 449 U.S. 539, 549 (1981).

Although at some points in our national history, divisions of value and viewpoints may have indicated that some state judges had an "unsympathetic attitude to federal constitutional claims," this Court has long been

> unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.

Stone v. Powell, 428 U.S. 465, 493 n.35 (1976).

State courts can be trusted to enforce constitutional rights in criminal proceedings and to apply the principles

articulated by this Court in its decisions interpreting the Constitution. The criminal judgment of a state court, after review by the state's appellate court system and opportunity for review in this Court, is a final resolution of the matters in dispute and rights of the parties that should remain undisturbed.

Nonetheless, Congress has determined that the liberty interest at stake in criminal judgments warrants an extra safeguard--an attack on repose and finality--that is not afforded in other cases. That safeguard is the writ of habeas corpus. It stands as the sentinel of personal liberty to guard against the rare state court which might lapse and fail to uphold the Constitution or fail to reasonably apply the controlling principles of constitutional law. It is in those rare situations that habeas is necessary to afford relief from "fundamentally lawless" imprisonment. *Fay v. Noia*, 372 U.S. 391, 423 (1963). Habeas corpus is "designed to guard against extreme malfunctions in the state criminal justice systems." *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring; joined by Burger, C.J., and Rehnquist, J.). Extreme malfunctions in the state criminal justice systems and fundamentally lawless imprisonment exist in those rare situations where the state court ignores or evades controlling federal constitutional principles. It is then that the writ of habeas corpus is needed.

2. Examination of the extent of the change in the law demonstrates that habeas guards against extreme malfunctions in the state criminal justice systems by permitting habeas relief only when a state court has refused to conform to controlling constitutional law or when a state court has failed to reasonably apply controlling constitutional law.

The historic and core purpose of habeas is reflected in *Teague* and its progeny, which recognize that habeas relief is not warranted when state trial and appellate courts conformed to then-existing constitutional standards or when the state courts faithfully applied existing constitutional law. *Teague*, 489 U.S. at 310. Habeas relief is not justified unless the state court refused to reach a result that was dictated by precedent at the time the state conviction became final. *Teague*, 489 U.S. at 301. Habeas relief is not justified if the state court's resolution of the criminal defendant's constitutional claims constitutes a reasonable, good faith interpretation of existing precedent. *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

The body of case law developed by this Court regarding the function of habeas, the limits on the proper exercise of habeas jurisdiction, and the retroactivity of its own decisions on collateral review foreshadows and provides context for determining both the extent of the change expressed in 2254(d) and for determining whether 2254(d) should be applied to cases that were pending when it was enacted.

Lindh correctly concedes that new 2254(d) extends *Teague* and its progeny. The new statute incorporates the *Teague* recognition that state courts are willing and able to enforce constitutional rights and that federal habeas is needed only to guard against the rare state court that

ignores or evades federal constitutional law. *Teague* recognized that the function of habeas is best served by permitting relief only if the state court refused to reach a result dictated by precedent or failed to reasonably apply controlling precedent.

Recognizing that the retroactivity principles of *Teague* define the proper scope of habeas corpus in 2254(d), Congress has now articulated a further limitation on the proper exercise of habeas corpus jurisdiction. Congress has now narrowly limited the circumstances in which a federal habeas court may grant relief to a prisoner in state custody, regardless of whether or not the prisoner overtly seeks the benefit of a "new" rule of law.

The nature of the change in the statute is that it reduces the authority of the federal habeas court to grant relief to a state prisoner. The changes embodied in 2254(d) go further than, but are not critically different from, the Court-developed *Teague* limitations on the exercise of habeas jurisdiction. As the Seventh Circuit explained, 2254(d) preserves the federal court's independent interpretive power to determine whether the state decision is contrary to clearly established United States Supreme Court precedent. The federal court must ensure that the state court adhered to legal principles articulated by this Court. *Lindh v. Murphy*, J.A. 179-80.

> But when the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts -- when it is, in the standard phrase, a "mixed question of law and fact" -- sec. 2254(d)(1) restricts the grant of collateral relief to cases in which the state's decision reflects "an unreasonable application of" the law.

Lindh v. Murphy, J.A. 180.

Under 2254(d), this Court sets the bounds of what is reasonable under the Constitution. Federal habeas courts must respect and leave undisturbed state court decisions which are within those bounds and which are reasonable. Section 2254(d) reserves "the grave remedy of upsetting a judgment entered by another judicial system after full litigation" for "grave occasions." *Lindh v. Murphy*, J.A. 182.

Similarly, the Fifth Circuit has held that the "unreasonable application" language of 2254(d) means that a federal court cannot grant habeas relief simply because it disagrees with the state court decision, for that would amount to a de novo review. The federal court may not grant relief unless the state court application of controlling precedent is unreasonable. An application of law to facts is unreasonable only if reasonable jurists considering the question would be of one view that the state court decision was incorrect. Thus, the federal court can grant habeas relief only if "a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard v. Johnson*, 97 F.3d 751, 768, 769 (CA5 1996), *cert. denied*, 65 U.S.L.W. 3598 (U.S. Mar. 3, 1997).

Lindh's alternative interpretation of the change wrought by the statutory amendment is to simply read the words "unreasonable application" out of the statute. He offers no theory that would support a conclusion that the Seventh Circuit incorrectly interpreted those words. Rather, he focuses on what he views as the terrible consequences of the Seventh Circuit's interpretation. Lindh says a federal court would have to allow a state court application of law to facts to stand if the state court's decision was reasonable, even if it was "wrong." What he means of course is that the federal court must allow the state court's decision to stand if it was reasonable, even if the federal court believes it was wrong. This Court must reject Lindh's implicit assumption that the federal court is always "right" and the state court is always "wrong." *See*

Lindh v. Murphy, J.A. 182; *see also Arizonans for Official English v. Arizona*, 65 U.S.L.W. 4169, 4173 n.11 (U.S. Mar. 3, 1997) (No. 95-974); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). Justice Jackson explained the humble reality that even the decisions of this Court are not right in any "pure" sense:

> Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

The distinction is important. Under the old law, in areas of application where reasonable jurists could disagree, the habeas statute, as interpreted, allowed a federal court to substitute its judgment for that of the state court. Under the new statute, in areas of application where reasonable jurists could disagree, the federal court is restrained from substituting its judgment for that of the state court. The federal court may not grant habeas relief unless the state court decision is contrary to clearly established United States Supreme Court precedent on a question of law or unless the state court application of that law to the facts is unreasonable.

The nature and extent of the change in the law demonstrate that 2254(d) does not have a retroactive effect because it serves to protect legitimate interests in settled

expectations, finality, and repose. As *Landgraf* instructs, we turn now to consideration of the degree of connection between the new rule and a relevant past event.

C. Consideration of the degree of connection between the new rule and a relevant past event leads to the conclusion that 2254(d) does not have a retroactive effect.

As discussed above, the nature of habeas and the nature and extent of the change rendered by 2254(d) demonstrate that it is a statute which regulates the circumstances in which a federal habeas court may grant relief. This conclusion in turn compels the conclusion that 2254(d) would not have a retroactive effect if applied to pending cases because it does not attach new legal consequences to events completed before its enactment. Focusing now on the "degree of connection between the operation of the new rule and a relevant past event," *Landgraf*, 511 U.S. at 270, the same conclusion is compelled. Section 2254(d) limits the power of the federal habeas court to exercise jurisdiction to grant relief. The operation of the new rule is primarily connected to the future action of the federal court--to grant or deny relief--which has not yet been completed in a pending case. There is no connection between operation of the new rule and a "relevant past event" within the meaning of *Landgraf*.

1. Section 2254(d) does not have a retroactive effect because it is both prospective and procedural.

A new statute has a retroactive effect only if it attaches new legal consequences to events completed before its enactment. *Landgraf* teaches that some categories, or classes, of statutes do not have that effect. Types of statutes which do not operate retroactively because they do not impose new legal consequences on events completed

before enactment include statutes that authorize or affect the propriety of prospective relief and statutes that change procedural rules. *Landgraf*, 511 U.S. at 273-76.

These categories of statutes do not have a retroactive effect because they do not attach new legal consequences to the primary conduct that gave rise to the suit. They do not unsettle the legitimate expectations of or impair the rights of the parties that vested or matured and became unconditional when that underlying conduct occurred. They govern the present and future; they do not seek to disturb and disrupt the past. Section 2254(d) does not operate retroactively and does not attach new legal consequences to completed events for the same reasons that other prospective and procedural statutes do not.

For example, a statute governing the propriety of injunctive relief operates *in futuro*. Therefore, on an appeal in an injunction case, it was appropriate for the reviewing court to apply a statute enacted while the appeal was pending. *Landgraf*, 511 U.S. at 273-74, discussing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921). Similarly, 2254(d) governs the propriety of prospective relief: it prohibits issuance of the writ unless certain conditions have been met. *Lindh v. Murphy*, J.A. 167.

Similarly, most procedural statutes apply to pending cases because rules of procedure regulate secondary conduct, not primary conduct. Application of such statutes does not impair rights a party possessed when the conduct underlying the lawsuit occurred, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. *Landgraf*, 511 U.S. at 275, 280. Lindh argues that, under prior law, he was entitled to de novo review of his constitutional claims by the federal court, but amended 2254(d) applies a new standard of review in which the federal court may not grant relief unless the state court adjudication is

unreasonable. Characterizing the new statute as imposing a new standard of review undercuts his claim that the statute should not apply to pending cases. A change in the standard of review is properly characterized as procedural. *United States v. Mejia*, 844 F.2d 209, 211 (CA5 1988). Generally, a standard of review governs the conduct of the reviewing court; it does not govern any underlying conduct of the parties to the lawsuit.[6]

Labels are not dispositive: the connection between the change in the law and the conduct regulated is.

2. Section 2254(d) does not have a retroactive effect because it is jurisdictional.

This Court's landmark decision in *Brown v. Allen* recognized that the function and scope of habeas define the jurisdiction of federal habeas courts to grant relief and that jurisdiction is "controlled by statute." *Brown v. Allen*, 344 U.S. at 460 (Reed, J.).

> Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the United States

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[6]An exception may exist, for example, in the Workmen's Compensation area, where the "standard of review" is viewed as an inextricable and integral part of the substantive contract right created by the Worker's Act. *United States Steel Mining Co., Inc. v. Riddle*, 627 So. 2d 455, 458 (Ala. Civ. App. 1993).

A state prisoner in a federal habeas case has no similar contractual, substantive right arising at the time of injury which might be adversely altered by a change in a standard of review.

> Constitution. [Citations omitted.] Indeed, the jurisdiction given to the federal courts to issue writs of habeas corpus by the First Judiciary Act, § 14, 1 Stat. 81, 82, extended only to prisoners in custody under authority of the United States. It was not until the Act of 1867 that the power to issue the writ was extended to an applicant under sentence of a State court. . . . It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress.

Brown v. Allen, 344 U.S. at 499-500 (Frankfurter, J.).

Specifically, this Court viewed former 2254(d) as a provision defining the jurisdiction of the federal habeas courts. In *Sumner v. Mata*, 449 U.S. at 547 n.2, in the context of applying the statutory presumption of correctness contained in old 2254(d), this Court explained:

> The present codification of the federal habeas statute is the successor to "the first congressional grant of jurisdiction to the federal courts." *Preiser v. Rodriquez*, 411 U.S. 475, 485, 93 S.Ct. 1827, 1833, 36 L.Ed.2d 439 (1973), and the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of that jurisdiction. As we held in *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed.2d 126 (1908), and have repeatedly since reaffirmed, "it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded."

The *Teague* limitation on the extent to which new law should disrupt the finality of an otherwise valid state criminal judgment also constitutes a "limitation on the proper exercise of habeas corpus jurisdiction," applicable to both capital and non-capital cases. *Saffle v. Parks*, 494 U.S. 484, 486 (1990).

Accordingly, there can be no doubt that new 2254(d), which prescribes when a federal habeas court can grant relief to a state prisoner, is a jurisdictional statute: it defines (and limits) the federal habeas court's power to act.

There is no reason for this Court to view new 2254(d) as anything other than a limitation on the exercise of federal court jurisdiction. And there is no reason for this Court to stray from its longstanding duty to see to it that the jurisdiction of the federal court, as defined and limited by 2254(d), is not exceeded.

Like the statutory presumption of correctness of state court fact findings in former 2254 and like this Court's *Teague* doctrine, new 2254(d) limits the exercise of federal habeas jurisdiction. *Sumner v. Mata*, 449 U.S. at 547 n.2; *Saffle v. Parks*, 494 U.S. at 486. New 2254(d) does not have a retroactive effect and does not attach new legal consequences to events completed before enactment because, like other jurisdictional statutes, it "speak[s] to the power of the court rather than to the rights or obligations of the parties." *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring in part), *quoted in Landgraf*, 511 U.S. at 274. *See also United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (CA9 1995).

A statutory change which divests the federal court of the power it previously had to hear a claim or grant relief applies to an action pending on the effective date of the statute. Such application of a jurisdiction-removing statute does not have a retroactive effect.

> Congress has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals

> authorized to hear and determine such rights and liabilities.

Bruner v. United States, 343 U.S. 112, 117 (1952). This is so even if the remaining tribunal left to the litigant is not even a court, but is only an executive agency. *Hallowell v. Commons*, 239 U.S. 506 (1916) (Act removing federal court jurisdiction applied to pending cases, leaving final and conclusive decision to Secretary of Interior); *see also Smallwood v. Gallardo*, 275 U.S. 56 (1927); *Crane v. Hahlo*, 258 U.S. 142 (1922); *Duldulao v. I.N.S.*, 90 F.3d 396, 399 (CA9 1996). Similarly, 2254(d) removes federal habeas jurisdiction to grant relief except in certain situations. The primary tribunals for enforcing federal constitutional rights in the context of state criminal proceedings are the state courts.

A statute authorizing a federal court to hear certain claims or to grant relief in certain circumstances does not create a right or liability. It provides a particular forum for vindicating a right or imposing a liability that is established by another law. So it is here. The federal habeas provisions do not grant, guarantee, or provide constitutional rights. Constitutional rights are granted, guaranteed, and provided by the Constitution. Constitutional rights exist, and remain to be vindicated, whether or not jurisdiction lies in any federal court. The state courts are required, and competent, to vindicate such rights. *Sumner v. Mata*, 449 U.S. at 549; *Stone v. Powell*, 428 U.S. at 493 n.35.

A limitation on federal court jurisdiction to grant habeas relief for a violation of constitutional rights is a limitation on a particular remedy; it is not a limitation on the constitutional rights themselves. If Congress had wholly eliminated federal habeas jurisdiction, as it wholly eliminated federal district court jurisdiction in *Bruner* and *Hallowell*, that ousting of jurisdiction would apply to any cases pending on the effective date of the enactment.

Logically, there is no reason for an act which wholly abolishes jurisdiction to apply to pending cases, but for an act which limits the exercise of jurisdiction not to apply to pending cases.

Lindh claims he had an unconditional right to relief which was triggered the day he filed his federal habeas petition. Lindh concedes that this Court properly applied the new habeas standards to the petitioner in *Felker v. Turpin*, 116 S. Ct. 2333 (1996), because in that case the petition was filed after the Act became law, even though the crime occurred and state court judgments were entered prior to enactment. Presumably, if Lindh had filed his petition after the date the Act became law he would concede that the federal court must apply 2254(d) to his case, even though his crimes occurred and the state court judgments were entered prior to enactment. Thus, he concedes that neither his crime, his trial, nor his state appellate proceedings constitutes a "relevant past event" which has a sufficient connection to the operation of the new law within the meaning of *Landgraf*.

Lindh claims the new law attaches new legal consequences to the filing of his habeas petition which occurred before the date of enactment. He asserts that the filing of the federal lawsuit itself gives him a protectible right. But this Court has unequivocally rejected similar views. If the new law may be applied to those who file habeas suits after the date of enactment, even though the conduct of the state proceedings at issue in the lawsuits occurred prior to enactment, as Lindh concedes it may, then there is no rationale for refusing to apply it to persons whose state court proceedings occurred prior to enactment but who filed their federal lawsuits before enactment. The filing of the lawsuit does not intensify, strengthen, or enlarge the petitioner's rights. *Hallowell*, 239 U.S. at 506. The policies embodied in 2254(d) are no less applicable to suits begun before enactment than to those "begun at a later day" and the act "as little interferes with existing

rights of the petitioners as it does with those of future litigants." *Smallwood v. Gallardo*, 275 U.S. at 61.

Some commentators view federal habeas as expressing Congress's determination that all state prisoners deserve one federal court appeal as of right of their federal constitutional claims and since the United States Supreme Court cannot, as a practical matter, provide direct review in all cases, the federal courts on habeas act as a surrogate for the Supreme Court.[7] To the extent Lindh shares this view, it also undercuts his argument that 2254(d) should not be applied to his case.

It has been long established that Congress can grant and take away the right to appeal. And when a statute eliminates appellate jurisdiction, that ousting of jurisdiction applies to all pending cases, regardless of when the underlying action commenced or when the events giving rise to the underlying action occurred. *See Ex parte McCardle*, 7 Wall. (67 U.S.) 506 (1869); *Felker v. Turpin*, 116 S. Ct. 2333 (1996). *See also American Steel*, 257 U.S. at 201 (Court noted that "[t]he complainant had no vested right in the decree of the District Court while it was subject to review").

Section 2254(d) deprives a federal habeas court of authority to grant relief to a state prisoner except in certain prescribed situations. It governs the present and future conduct of the federal court, not the past conduct of a party. In a pending case, the grant or denial of relief is a future act, not a past act. It speaks to a procedural remedy provided by a court, not to actionable past conduct of a party. Section 2254(d) is a jurisdictional statute. It limits the exercise of federal habeas jurisdiction. It does not attach new legal consequences to events completed

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[7] 1 James S. Liebman and Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.4d (2d ed. 1994).

before enactment and its application to pending cases will not have a genuinely retroactive effect.

3. Section 2254(d) does not have a retroactive effect because it does not divest a habeas petitioner of a vested, mature, or unconditional right to relief or alter the normative scope of a cause of action.

Lindh attempts to avoid the conclusion that new 2254(d) is jurisdictional and does not attach new legal consequences to past acts by asserting that the statute alters his "cause of action" and deprives him of a "vested," "mature," or "unconditional" right to which he was entitled when he filed his habeas petition.

Curiously, Lindh hitches his star not to the date of the underlying conduct (his crime) or alleged injury to him (presumably the date of an adverse state court decision), but to the date he filed his federal habeas petition. He claims that he had a "cause of action" or "right to relief from a constitutional violation" that matured, vested, or became unconditional on the date he filed his habeas petition in 1992, by virtue of filing the petition, before enactment of new 2254(d). But his "cause of action" or "right to relief" is nothing but an unprotected hope of a particular outcome. His theory that the filing of a lawsuit is a "relevant past event" giving rise to a protected "right" to a desired outcome finds no support in law or logic.

The retroactivity rules exist to protect legitimate expectations about legal consequences of conduct and to ensure predictability and stability. Lindh cites many cases in which courts have held that new statutes should not apply, but those cases do not advance his cause. They are mostly cases involving property or contract rights in which the connection between the new law and a relevant past event is easy to perceive. There is no such property or

contract right at issue here. And none of Lindh's cases suggest that the relevant past event is the date a lawsuit was filed, rather than the date the agreement was reached or the conduct at issue occurred.[8] *See, e.g., Bennett v. New Jersey*, 470 U.S. 632, 638-39 (1985) (grant obligations generally should be determined by reference to the law in effect when the grants were made).

Lindh also attempts to latch on to cases in which courts have declined to apply a new law that alters the normative scope of a cause of action. But his analogy fails. Those cases stand for the proposition that a cause of action--such as a negligence or wrongful death claim--depends on the status of the law at the time of injury. The relevant past event is the accident or injury, not the subsequent filing of a lawsuit seeking redress for the accident or injury. The time the lawsuit is filed is not the critical date. The time of injury is the relevant past event because a statute altering a cause of action changes the legal consequences of the conduct that occurred at the time of injury. A statute passed subsequent to the injury attaches new legal consequences if it increases the amount recoverable or makes the defendant liable for actions for which he was not liable under the old law. *See Thomas v. Cumberland Operating Co.*, 569 P.2d 974, 976 (Okla. 1977).

This is precisely the type of harm identified in *Landgraf* and *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), where the change in the Civil Rights Act increased the liability of the employer for conduct which had occurred before enactment. Such statutes have a retroactive effect because they increase a party's liability for past conduct. *Landgraf*, 511 U.S. at 283-84. The provision at issue in *Rivers* altered the normative scope of

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[8]The cases cited in Lindh's brief and "appendix" are too numerous, and too irrelevant, to warrant individual discussion. They can be disposed of categorically, as the State demonstrates.

the law because it created liabilities that had no legal existence before the provision was enacted. *Rivers*, 511 U.S. at 303. That is a new legal consequence within the meaning of *Landgraf*. Nothing comparable occurs if 2254(d) is applied to a pending case in which the events giving rise to the claim occurred prior to enactment or the petition was filed prior to enactment.

Conversely, application of a new statute to reduce the damages the injured party may receive after the right accrued would have a retroactive effect because it would impair a right the party possessed when the relevant conduct occurred. Once a cause of action for negligence accrues, the injured party has a vested property right in the cause of action which is impaired if the right is thereafter reduced. *See generally Martin v. Richards*, 192 Wis. 2d 156, 200-06, 531 N.W. 2d 70, 88-91 (1995); *Lavieri v. Ulysses*, 149 Conn. 396, 180 A.2d 632 (1962); *Kleibrink v. Missouri-Kansas-Texas R.R. Co., Inc.*, 224 Kan. 437, 581 P.2d 372, 378-79 (1978). Lindh has no comparable vested right.

Lindh is hard pressed to identify a degree of connection between the operation of 2254(d) and a relevant past event that is remotely similar to his own analogies. The necessary connection is missing because 2254(d) does not regulate the conduct of the parties in the way that a statute involving discrimination, negligence, wrongful death, contract, or property rights regulates the conduct of the parties or their business. Moreover, those cases involve primary conduct of parties and initial lawsuits to determine the parties' rights and obligations. Habeas is very different. It involves secondary conduct and collateral relief. *Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983). In his attempt to fall within the *Landgraf* nonretroactive rule Lindh creates an incredible fiction that he had a "cause of action" or "right to relief" that accrued, vested, matured, or became unconditional upon the filing of the habeas petition itself. Citing *Boria v. Keane*, 90 F.3d 36 (CA2 1996), Lindh

argues that 2254(d) has a retroactive effect simply because its application would result in a different outcome (brief of Lindh at 44). Both Lindh and *Boria* are wrong. *Lindh v. Murphy*, J.A. 168.

Unlike *Landgraf*, *Rivers*, and all the other cases Lindh analogizes to, the change in outcome here is not related to an event or conduct completed before enactment of the new law. Here, any change in outcome which occurs will occur because the federal court has less authority to grant relief--less power to exercise its jurisdiction--under the new law. That change is a change in the power of the court; it is a change in what the court can do in the future. It is not a change in legal consequences of past conduct of a party or a diminution of a vested, mature, or unconditional right of a party.

When we push aside Lindh's emotional rhetoric and the smokescreen of non-analogous cases, Lindh's claim that 2254(d) deprives him of a "right to relief" comes into sharp focus. It is nothing more, nor less, than a claim that he had a "right" to a favorable outcome which he hoped to receive when he filed his petition and which he concedes he will not receive if the new provision is applied.

Lindh's claim is one the law, wisely, does not recognize. "[N]o person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit . . . ." *Chicago & Alton R.R. Co. v. Tranbarger*, 238 U.S. 67, 76 (1915).

He cannot sustain his assertion that under the law as it existed when he filed his habeas petition in 1992 nothing short of his own death could have divested Lindh "of his right to relief from the constitutional violation in his case" (brief of Lindh at 43).

In the broad sense Lindh urges, this Court's own decisions in the volatile habeas area have operated to

"divest" habeas petitioners of the right to relief they expected to receive when they filed their petitions. In *Stone v. Powell*, state prisoners who fully expected to have their Fourth Amendment claims considered by a federal habeas court when they filed their petitions were told their claims were no longer cognizable on federal habeas. The Court rejected the prisoners' plea to have this new rule apply only prospectively. *Stone v. Powell*, 428 U.S. at 495 n.38.

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the state prisoner surely expected to be awarded relief unless the state could prove the error harmless beyond a reasonable doubt when he filed his habeas petition. But this Court held in *Brecht* that a habeas petitioner would not be entitled to relief based on trial error unless he could establish that the error resulted in actual prejudice--that it had substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 638. The new standard was applied to Brecht and he was denied habeas relief. *Id.* at 638-39. *See also Teague v. Lane*, 489 U.S. 288 (1989).

These cases demonstrate that a particular habeas petitioner will not always be granted the benefit of the habeas law in effect when he filed his habeas petition. The Court's declaration of a different or new rule is dependent on the Court's interpretation of the scope of habeas relief, as created and intended by Congress. *See Teague v. Lane*, 489 U.S. at 305-09; *Brecht v. Abrahamson*, 507 U.S. at 632-35; *Stone v. Powell*, 428 U.S. at 475-82. Obviously, this Court's imposition of a new or different rule in a habeas case pending before it, in the performance of its duty to interpret and apply Congress's will, does not divest the habeas petitioner in that case of a "vested right." Surely, then, application of a new statute by which Congress itself has limited the circumstances in which a federal habeas court can grant relief cannot be said to "divest" a petitioner

in a pending case of a "vested," mature, or unconditional right.

Lindh's desire to have his claim reviewed under the old law, which is more favorable to him, is understandable. But it is only a desire; it is not a protected interest. *Cf. Lockhart v. Fretwell*, 506 U.S. 364, 373 (1993).

IV. The Court Below Did Not Substitute An Actual Reliance Test Or A Wrongful Presumption Of Retroactivity For Habeas Curtailing Statutes in Place Of The *Landgraf* Principles.

It remains to address two red herrings Lindh casts out in an attempt to distract this Court from the genuine issues presented in this case, which are discussed above. This Court should resist the bait.

A. The court below did not impose a test of actual, individual reliance.

The court of appeals did not substitute an "actual reliance" test for the *Landgraf* "new legal consequences" test. Applying *Landgraf's* teachings, the court concluded that application of 2254(d) to pending cases would not have a retroactive effect because 2254(d) does not attach new legal consequences to events completed before its enactment. *Lindh v. Murphy*, J.A. 162, 172.

The court's ruling that 2254(d) applies to pending cases is a rule for all pending habeas cases; it does not purport to be a rule that requires a factual determination that a particular petitioner did or did not rely on prior law when he filed his petition. The court's opinion does not say that an actual reliance interest is dispositive. It does not say that presence of an actual or legitimate reliance interest will render inapplicable a statute that would otherwise be applicable. And it does not say that the absence of an

actual, or legitimate, reliance interest will render applicable a statute that would otherwise be inapplicable.

Rather, the court simply recognized, as this Court has, that the new legal consequences analysis is guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270. The court discussed reliance interests in the context of distinguishing the Act's new time limits from the provision in 2254(d). *Lindh v. Murphy*, J.A. 168-72. Established case law supports the court of appeals' conclusion that the new one-year time limit should not apply to petitions which were already filed when the Act was enacted and there should be a one-year grace period to permit any habeas petitioner who has not yet filed a first petition to do so. It is inappropriate to apply a new time limit for filing an action to an action that had already been properly filed under prior law. *See Landgraf*, 511 U.S. at 275 n.29. And this Court has advocated that when a new statute of limitations is enacted, the courts must allow a reasonable time after enactment for the commencement of suits upon existing causes of action. *See Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 286 n.23 (1983); *Texaco, Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982).

Lindh argued in the Seventh Circuit that the new law should not apply to him because he made litigation decisions (decisions not to seek further state court relief and not to seek direct review in this Court) in reliance on the kind of review he would get on habeas back in 1992 when he elected to file his habeas petition. Lindh also claimed that it would be unfair to apply the new law to him personally because his case progressed too slowly in the district court. The court of appeals found these claims groundless. It could have simply refused to consider them because individual, actual reliance interests are irrelevant to the *Landgraf* analysis. If the court erred, it erred only

by being too generous to Lindh by discussing his reliance claims at all.[9]

Lindh's exposition[10] that reliance interests are not dispositive is much ado about nothing. The court of appeals agreed that any actual, personal reliance Lindh might have felt he had in the old law is legally irrelevant to the *Landgraf* analysis. This Court should discuss the issue only long enough to express its agreement with that conclusion.

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[9]Having criticized the court of appeals for considering actual reliance, Lindh apparently cannot resist asking this Court to do the same. It should decline the invitation. It is ridiculous to believe that Lindh actually chose to forgo a chance for relief in this Court or the state postconviction courts because he wanted the assurance of de novo relief a habeas petition then provided. Surely, any litigant would take the most expeditious route to freedom. "Release from a conviction or sentence is better sooner rather than later . . . ." *Hunter v. United States*, 101 F.3d at 1573. The State did not knowingly misrepresent facts to the Wisconsin Supreme Court during litigation in that court (brief of Lindh at 46 n.36). Lindh never suggested such a thing until en banc review in the Seventh Circuit. He presents absolutely no explanation for his silence. His belated claim that 2254(d) makes certain factual matters relevant defies understanding. Under the old statute, he could have taken issue with the facts found by the state supreme court. He elected not to do so. He cannot blame that choice on the enactment of the new law.

[10]The State will not individually discuss the many "reliance" cases Lindh presents. It is sufficient to note that they are irrelevant, he overstates their holdings, and his "appendix" of case law grossly violates this Court's rules. Sup. Ct. R. 24(3) (counsel are cautioned not to include in an appendix arguments or citations that properly belong in the body of the brief).

B. The court below properly considered the nature of federal habeas relief in concluding that 2254(d) applies to pending cases.

This Court should reject Lindh's complaint that the court of appeals improperly replaced the *Landgraf* analysis with an improper "presumption." The court of appeals applied the *Landgraf* analysis and properly concluded that 2254(d) applies to pending cases.

The court of appeals rejected Lindh's claim that he had a vested right in the law which governed at the time he filed his federal habeas petition. In rejecting Lindh's argument, the court considered both the nature of federal habeas and the nature of 2254(d). This is precisely what *Landgraf* instructs. *Landgraf*, 511 U.S. at 270 (court must consider the nature and extent of the change in the law).

The court of appeals recognized that federal habeas is not designed to leave settled matters in repose. The federal habeas petitioner has no interest in the finality of the state court judgment he attacks; the very purpose of a habeas petition is to overturn a final and presumptively valid state judgment. *Lindh v. Murphy*, J.A. 164-66, quoting *Lockhart v. Fretwell*, 506 U.S. at 372-73. Section 2254(d) limits the disruptive effects of habeas by limiting the circumstances in which a federal habeas court can grant relief. Thus, 2254(d) makes the final state judgment more stable. *Lindh v. Murphy*, J.A. 164. It makes perfect sense that a provision which is designed to make final judgments more stable and secure would apply to existing judgments. The court of appeals simply recognized this logic: "In other words, legal changes that reduce the willingness of federal courts to set aside judgments presumptively apply to existing judgments." *Lindh v. Murphy*, J.A. 166. The court's logic is unassailable. Because the purpose of 2254(d) is to curtail collateral relief and to augment the finality of state judgments, there is a

strong implication that it should apply to "existing judgments." *Id.*

Lindh chastises the court of appeals for finding support in the case law of this Court which

> consistently applies statutory changes in the law of collateral attack to pending cases, and perforce to newly filed cases that seek relief from judgments entered before the statute's enactment.

Lindh v. Murphy, J.A. 166. But he fails to cite a single case where this Court has, in fact, declined to apply changes in the law limiting collateral attack to pending cases.

At one point (brief of Lindh at 48-49), Lindh suggests his rights were determined by the state court proceedings which occurred before the habeas petition was filed. But if that is correct, *Felker v. Turpin*, 116 S. Ct. 2333, is wrong. *Felker* applied the new habeas provisions to a petition filed after the Act's enactment date, even though the state court proceedings were completed before that date. Lindh concedes *Felker* is correct, and distinguishable from his own case, because in *Felker* the petition was filed after the Act became law. Lindh's suggestion that his rights attached before his habeas petition was filed is therefore directly contrary to *Felker*. Lindh's primary theory is that the date the petition was filed is the critical date for determining the applicability of 2254(d).[11] The state has already illustrated the defects in this theory and will not repeat all of the argument here.

Lindh is simply wrong. The filing of the habeas petition does not cause any right to mature or become unconditional. The filing of the petition does not

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[11]This view has been rejected by the courts. *See Leavitt v. Arave*, 927 F. Supp. at 399 n.4.

determine the rights of the party. The filing of the petition is simply a request to the federal court to grant relief. Whether the court has authority to grant that writ depends on the statute in existence when that federal court exercises its authority--when it grants or denies relief. That current authority is embodied in 2254(d), and any federal court granting or denying relief after the enactment of 2254(d) is limited by the terms of 2254(d). Section 2254(d) defines the grounds upon which the federal court may grant habeas relief. It is the time of the federal court's decision, not the time when the state court proceedings occurred or the time when the habeas petition was filed, which matters.

This is what *Landgraf* teaches. Section 2254(d) does not operate retroactively upon pending habeas cases because it attaches no new legal consequences to events completed before enactment. It imposes new legal strictures on current and future events--on pending habeas cases and habeas cases yet to be filed.

Characterizing the question somewhat differently yields the same result. Instead of asking whether 2254(d) attaches new legal consequences to events completed before enactment, let us ask, "what is the relevant activity that the rule regulates?" *Rivers v. Roadway Express*, 511 U.S. at 291 (Scalia, J., concurring; joined by Kennedy, J., and Thomas, J.) Section 2254(d) regulates the federal court's activity of granting, or denying, habeas relief. It is a jurisdictional statute, which limits the federal court's authority to grant habeas relief. As Justice Scalia explained:

> [T]he purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power--so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised. Thus, applying a jurisdiction-eliminating statute to undo

> past judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively.

Id. at 293.

Accordingly, here, the relevant event for purposes of determining whether 2254(d) applies is the point at which the federal court exercises its power to grant or deny relief. It is not the point at which the crime, the state court proceedings, or the filing of the petition occurred. A federal habeas court exercising its statutory power to grant or deny relief can exert only the power it possesses at the time it acts. Hence, if a federal habeas court exercises its authority to grant or deny relief after the effective date of the new habeas Act, as the court of appeals did here, it is constrained to exert only the limited power given to it by 2254(d).

Section 2254(d) limits the jurisdiction of a federal habeas court by depriving the federal habeas court of authority to grant relief to a state prisoner except under narrowly prescribed circumstances. The court of appeals properly applied 2254(d) to Lindh's case, which was pending before it when 2254(d) became law. Under the limitations imposed on the court by 2254(d), the court of appeals properly denied Lindh's request for habeas relief.

CONCLUSION

For the reasons discussed above, the State of Wisconsin requests this Court to affirm the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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